

themselves engage LRA forces unless necessary for self defense. All appropriate precautions have been taken to ensure the safety of U.S. military personnel during their deployment.

I have directed this deployment, which is in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. I am making this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in this action.<sup>4</sup>

## BRIEF NOTES

### *Supreme Court Grants Certiorari in Alien Tort Statute and Torture Victim Protection Act Cases*

In October 2011, the U.S. Supreme Court granted certiorari in two cases posing important questions about the potential liability of corporations and groups for human rights violations under the Alien Tort Statute (ATS)<sup>1</sup> and the Torture Victim Protection Act.<sup>2</sup> The Court will review the Second Circuit's controversial decision in *Kiobel v. Royal Dutch Petroleum* in which the Second Circuit held that there can be no corporate ATS liability.<sup>3</sup> The Court will also hear *Mohamad v. Rajoub*, where the D.C. Circuit in March 2011 rejected in a claim alleging torture by officers of the Palestine Liberation Organization and the Palestinian Authority.<sup>4</sup> The cases will be argued in tandem.<sup>5</sup>

In *Kiobel*, the questions presented are

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute (ATS), 28 U.S.C. §1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.
2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.<sup>6</sup>

In *Mohamad*, the question presented is whether the Torture Victim Protection Act "permits actions against defendants which are not natural persons."<sup>7</sup>

<sup>4</sup> White House Press Release, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army (Oct. 14, 2011), at <http://www.whitehouse.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore>.

<sup>1</sup> 28 U.S.C. §1350.

<sup>2</sup> 28 U.S.C. §1350, note 2(a).

<sup>3</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011); see John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 122, 142 (2011); Chimène I. Keitner, *Kiobel v. Royal Dutch Petroleum: Another Round in the Fight over Corporate Liability Under the Alien Tort Statute*, ASIL INSIGHTS, Sept. 30, 2010.

<sup>4</sup> *Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011) ("We reject the [plaintiffs'] argument because the structure of the TVPA confirms what the plain text of the statute shows: The Congress used the word 'individual' to denote only natural persons.").

<sup>5</sup> Adam Liptak, *Two Human Rights Cases on Supreme Court Docket*, N.Y. TIMES, Oct. 18, 2011, at B1; Robert Barnes, *Supreme Court to Review Free-Speech Case*, WASH. POST, Oct. 18, 2011, at A2.

<sup>6</sup> Available at <http://www.supremecourt.gov/qp/10-01491qp.pdf>.

<sup>7</sup> Available at <http://www.supremecourt.gov/qp/11-00088qp.pdf>.

*Professor Sean Murphy Elected to International Law Commission*

In November 2011, Professor Sean Murphy, the Patricia Roberts Harris Research Professor of Law at the George Washington University Law School, was elected to a five-year term on the International Law Commission (ILC). The ILC is a body of independent legal experts, created by the UN General Assembly, that is devoted to promoting the development and codification of international law.<sup>8</sup> For many years Murphy edited this section of the *Journal*.

Murphy was one of thirty-four members elected to the ILC by secret balloting in the UN General Assembly. Seats on the ILC are allocated among the General Assembly's regional groups. He was one of eight jurists elected from among nine candidates offered by states belonging to the Western European or Others Group (WEOG).<sup>9</sup> The voting for the eight WEOG candidates was as follows:

Western European and Other States (8 seats)	
Number of ballot papers:	192
Number of invalid ballots:	0
Number of valid ballots:	192
Abstentions:	2
Number of Members present and voting:	190
Required majority:	96
Number of votes obtained:	
Nolte, Georg (Germany)	175
Jacobsson, Marie G. (Sweden)	166
Escobar Hernández, Concepción (Spain)	163
Forteau, Mathias (France)	161
McRae, Donald M. (Canada)	158
Murphy, Sean D. (United States)	158
Wood, Michael (United Kingdom)	154
Cafilisch, Lucius C. (Switzerland)	149
Wouters, Jan M. F. (Belgium)	134

*Treaty to Combat Illegal and Unregulated Fishing Submitted to Senate for Advice and Consent*

In November 2011, President Obama transmitted to the Senate for advice and consent the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, concluded following negotiations at the UN Food and Agriculture Organization in 2009.<sup>10</sup> A U.S. Department of State announcement giving background on the treaty follows:

On November 14, President Obama submitted to the Senate, for its advice and consent, a new treaty designed to combat illegal fishing activities worldwide. The treaty, known as

<sup>8</sup> UN Press Release No. GA 11175, General Assembly Fills Vacancies on International Law Commission, Committee for Programme and Coordination (Nov. 17, 2011), at <http://www.un.org/News/Press/docs/2011/ga11175.doc.htm>.

<sup>9</sup> In addition to the eight ILC members from the WEOG, nine experts were elected from African states, eight from Asia, three from Eastern Europe, and six from Latin American and the Caribbean.

<sup>10</sup> John R. Crook, *Contemporary Practice of the United States*, 103 AJIL 741, 775 (2009).

the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, will help ensure that illegally harvested fish do not enter the stream of commerce.

Illegal, unreported and unregulated (IUU) fishing is a global problem that threatens healthy ocean ecosystems and sustainable fisheries. It undermines the sustainable practices of legitimate fishing operations in the United States, and elsewhere, and presents unfair market competition to sustainable seafood products. An estimated \$10 to \$23 billion in global value is lost annually due to IUU fishing.

All fish caught commercially at sea must eventually come to port. The Port State Measures Agreement requires nations that are party to the Agreement to take a number of practical steps to deny port entry and access to port services to foreign fishing and transport vessels that have harvested fish in violation of applicable rules or have supported such fishing.

Following calls from Congress to crack down on illegal fishing worldwide, the United States played an active role in the negotiation and adoption of this Agreement at the Food and Agriculture Organization of the United Nations. The United States was among the nations that signed the Agreement when it was adopted in 2009. To date, 22 nations and the European Union have signed the Agreement, and it will take effect once 25 nations have ratified it. Three nations and the European Union have completed their ratification procedures for the Agreement.

Interested stakeholders in the United States, including representatives of the fishing industry, the U.S. fishery management councils and the environmental community, participated on the U.S. delegation in the negotiation of the Agreement and continue to support its implementation.

The Department of State, along with the Department of Commerce and other interested agencies, looks forward to working with the Senate, with a view to securing advice and consent to ratification of the Agreement. The Administration also looks forward to working with both Houses of Congress on legislation to implement the Agreement.<sup>11</sup>

*U.S. and European Antitrust Authorities Celebrate Two Decades of Cooperation, Issue New Merger Review Guidelines*

During their annual consultations in October 2011, U.S. and European antitrust authorities celebrated twenty years of cooperation under the United States–European Union antitrust cooperation agreement.<sup>12</sup> The participating agencies also announced agreement on a new set of “best practices” to be followed by U.S. and European agencies in coordinating reviews of proposed mergers. A substantial excerpt from a Department of Justice press release marking these events follows:

The Department of Justice, Federal Trade Commission (FTC) and the European Commission today issued an updated set of “best practices” that they use to coordinate their merger reviews. The agencies also celebrated the 20th anniversary of the United States–European Union bilateral antitrust agreement.

<sup>11</sup> U.S. Dep’t of State Press Release No. 2011/1927, President Obama Submits Port State Measures Agreement to Senate (Nov. 14, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/11/177154.htm>.

<sup>12</sup> Agreement Regarding the Application of Competition Laws, Sept. 23, 1991, U.S.–Eur. Comm’n, 30 ILM 1487 (1991), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21995A0427\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21995A0427(01):EN:HTML).

Following their annual antitrust consultations earlier today, [senior U.S. and European competition officials] . . . praised the success of the cooperation agreement, and noted that international coordination and cooperation have steadily increased over 20 years. The agencies reaffirmed their commitment to cooperation and coordination in order to benefit consumers and business.

The 1991 agreement, which was signed in Washington, D.C. on September 23, provided for mutual notification of enforcement activities affecting each other's important interests; exchange of non-confidential information and regular meetings among the agencies; cooperation and coordination of enforcement activities; consideration of requests by one party to pursue enforcement activities against anticompetitive conduct affecting the interests of the requesting party; and taking into account at all stages of enforcement, the important interests of the other party.

. . . .

The best practices, originally issued in 2002, provide an advisory framework for inter-agency cooperation when one of the U.S. agencies and the European Commission's Competition Directorate review the same merger. The revised U.S.-E.U. best practices:

- Provide more guidance to firms about how to work with the agencies to coordinate and facilitate the reviews of their proposed transactions;
- Recognize that transactions that authorities in the U.S. and Europe review may also be subject to antitrust review in other countries; and
- Place greater emphasis on coordination among the agencies at key stages of their investigations, including the final stage in which agencies consider potential remedies to preserve competition.

. . . .

The United States also has cooperation agreements with: Australia, Brazil, Canada, Chile, China, Germany, Israel, Japan, Mexico, and Russia.<sup>13</sup>

### *United States, Belgium Conclude Agreement on Combating Serious Crime*

In September 2011, the U.S. Department of Justice announced conclusion of an agreement with Belgium on combating serious crime, the twentieth such agreement concluded by the United States. Inter alia, the agreement allows the parties to exchange biometric and biographical data of suspected criminals. The Department of Justice announcement follows:

Attorney General Eric Holder today joined Belgian Minister of Justice Stefaan De Clerck and Minister of Interior Annemie Turtelboom to sign an agreement on Preventing and Combating Serious Crime (PCSC), which will allow for the exchange of biometric and biographic data of suspected criminals between the United States and Belgium to bolster counterterrorism and law enforcement efforts while protecting individual privacy.

Under the agreement, Belgium and the United States will leverage state-of-the-art technology to share law enforcement data, including fingerprints, to better identify known terrorists and criminals during investigations and other law enforcement activities. The

<sup>13</sup> U.S. Dep't of Justice Press Release No. 11-1364, United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews (Oct. 14, 2011), at <http://www.justice.gov/opa/pr/2011/October/11-at-1364.html>.

agreement authorizes the use of specific mechanisms for sharing vital information to help prevent serious threats to public security, and requires measures to ensure the protection and privacy of citizens in both countries. In fact, the PCSC contains numerous provisions pertaining to the handling, sharing, and retention of relevant data, all designed to ensure privacy and data protection.

Belgium is the 20th country with which the United States has signed an agreement to prevent and combat serious crime. Among the other international partners who have concluded similar agreements with the United States are Germany, the Netherlands, Finland, Spain, Estonia, Greece and South Korea. These agreements—negotiated by the Departments of Homeland Security, Justice and State—prevent individuals who commit serious crimes in one signatory country from continuing illicit acts in another, and reaffirm the strong commitment of the United States to reciprocal partnerships that advance the safety and security of the United States and its allies.<sup>14</sup>

### *Thousands of Contract Security Personnel to Protect U.S. Diplomatic Operations in Iraq*

The U.S. Department of State plans a huge physical presence in Iraq following the withdrawal of U.S. military forces by the end of 2011,<sup>15</sup> and U.S. officials are concerned about the risks to their security posed by Iranian-backed Shiite militias or other dissident forces.<sup>16</sup> In response to an October 2011 press inquiry, the Department indicated that approximately five thousand security personnel provided by private contractors will be required to provide security for U.S. diplomatic operations in Iraq following the withdrawal of U.S. forces.

**QUESTION:** Approximately how many security contractors will be required in Iraq to protect the U.S. diplomatic mission next year?

**ANSWER:** In light of the high threat environment in Iraq over the past several years, we expect that in 2012 there will be approximately 5,000 such security personnel to help protect our diplomatic presence in various locations around the country and ensure our capability to interact successfully with the Iraqi Government and people to build an enduring partnership of benefit to both countries and the region. We expect this number of security personnel to noticeably decrease in the following years as security conditions continue to improve, as they have done steadily since 2007.

In addition, the Office of Security Cooperation-Iraq (OSC-I) will be part of our strategic engagement and partnership with Iraq. This office will require additional security personnel to protect facilities and staff. The exact number and final disposition of these security requirements are still under review.

The United States is committed to an enduring partnership with Iraq, which can be a strong ally in a strategic region of the world critical to our national security. This Administration has placed a priority in strengthening our partnership by maintaining a strong diplomatic presence on the ground in Iraq and is committed to ensuring the safety of the men and women who make up that presence. Utilizing security personnel to assist U.S. diplomatic security officials in protecting Americans serving abroad is not a new practice; it has been part of civilian operations in Iraq and elsewhere in the past and is an important

<sup>14</sup> U.S. Dep't of Justice Press Release No. 11-1212, United States and Belgium Sign Agreement to Prevent and Combat Serious Crime (Sept. 20, 1011), at <http://www.justice.gov/opa/pr/2011/September/11-ag-1212.html>.

<sup>15</sup> See section above: *U.S. Troops Leaving Iraq, Fulfilling Withdrawal Deadline Agreed to in 2008*.

<sup>16</sup> Liz Sly, *U.S. General Predicts Unrest in Iraq*, WASH. POST, Nov. 22, 2011, at A10.

component of security operations at many of our embassies and consulates around the world today.

As Iraq further develops its democratic institutions and improves its security capacity, our security presence will be reduced and operations will be comparable to other countries around the world where we have large missions and vital interests.<sup>17</sup>

### *Ninth Circuit to Consider Armenian Genocide Case a Third Time*

*Movesian v. Victoria Versicherung AG* is returning to the U.S. Ninth Circuit Court of Appeals for a third time. The case asks whether California Civil Procedure Code §354.4, which extends the statute of limitations for claims against European life insurance companies by survivors of the Armenian genocide or their descendants through 2016, conflicts with U.S. foreign policy. On the case's first visit to the court, a divided three-judge panel concluded that the extended statute of limitations conflicted with federal policy and was preempted.<sup>18</sup> A year later, a member of the initial majority changed her position. The panel issued a second opinion reaching the opposite conclusion and allowing suits against the insurers to proceed.<sup>19</sup>

In November 2011, the Ninth Circuit decided to address the case a third time, this time en banc: "Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."<sup>20</sup>

### *International Arms Trafficker Viktor Bout Convicted in U.S. Federal Court*

In November 2011, a federal jury in New York found accused international armed trafficker Viktor Bout guilty on four felony counts.<sup>21</sup> Bout, who faces a sentence of from twenty-five years to life in prison, will be sentenced in February 2012. Following heated and lengthy proceedings in Thailand, Bout was extradited to the United States in 2010.<sup>22</sup> A short excerpt from the U.S. Department of Justice's announcement of his conviction follows:

NEW YORK—International arms dealer Viktor Bout was found guilty today of conspiring to sell millions of dollars worth of weapons to the Fuerzas Armadas Revolucionarias de Colombia (FARC)—a designated foreign terrorist organization based in Colombia—to be used to kill Americans in Colombia, announced the Department of Justice.

.....

<sup>17</sup> U.S. Dep't of State Press Release No. 2011/1672, Iraq: U.S. Diplomatic Mission and Security Personnel for 2012 (Taken Question) (Oct. 5, 2011), at <http://www.state.gov/r/pa/prs/ps/2011/10/175059.htm>.

<sup>18</sup> 578 F.3d 1052 (9th Cir. 2009); see John R. Crook, Contemporary Practice of the United States, 102 AJIL 346, 349 (2008), 103 AJIL 741, 743 (2009).

<sup>19</sup> 629 F.3d 901 (9th Cir. 2010); see John R. Crook, Contemporary Practice of the United States, 105 AJIL 333, 354 (2011).

<sup>20</sup> 2011 U.S. App. LEXIS 22526, at \*3 (9th Cir. Nov. 7, 2011).

<sup>21</sup> Benjamin Weiser, *Court Hears Claim that an Arms Sting Lured a Russian*, N.Y. TIMES, Oct. 13, 2011, at A22; Colum Lynch, *Russian on Trial Before N.Y. Jury in Arms Case*, WASH. POST, Oct. 13, 2011, at A4; Noah Rosenberg, *Guilty Verdict for Russian in Arms Trial*, N.Y. TIMES, Nov. 3, 2011, at A22.

<sup>22</sup> John R. Crook, Contemporary Practice of the United States, 104 AJIL 654, 677 (2010), 105 AJIL 122, 149 (2011).

Bout was arrested in Thailand in March 2008 based on a complaint filed in Manhattan federal court. He was subsequently charged in a four-count indictment in May 2008 and extradited to the Southern District of New York in November 2010. Bout was convicted today of conspiring to kill U.S. nationals; conspiring to kill U.S. officers and employees; conspiring to acquire and use anti-aircraft missiles; and conspiring to provide material support to a designated foreign terrorist organization. The three-week jury trial was presided over by U.S. District Judge Shira A. Scheindlin.<sup>23</sup>

*U.S. Diplomat Indicted in Virginia for Assaulting His Wife in Senegal*

In October 2011, the U.S. Department of Justice announced the indictment of a U.S. Foreign Service officer on an assault charge stemming from an assault on his wife in Dakar, Senegal, where the defendant was serving as a diplomat with diplomatic immunity from local criminal jurisdiction.

WASHINGTON—Michael Makalou, 40, a State Department employee, was indicted by a federal grand jury on one count of assault with a dangerous weapon with intent to do bodily harm, announced Assistant Attorney General Lanny A. Breuer of the Criminal Division and U.S. Attorney for the Eastern District of Virginia Neil H. MacBride.

The indictment was returned yesterday in the Eastern District of Virginia. According to court documents, Makalou resided with his wife and children in Dakar, Senegal, and worked as a political officer at the U.S. Embassy in Dakar. A publicly filed affidavit alleges that on the morning of Aug. 13, 2011, an argument erupted between Makalou and his wife. According to the affidavit, Makalou then began to physically assault his wife, which included choking her, striking her head with closed fists and stomping on her back with his feet. As a result of the attack, Makalou's wife suffered a concussion as well as lacerations to her gums, multiple contusions and bruising.

If convicted, Makalou faces a maximum penalty of 10 years in prison.

This case was investigated by the Diplomatic Security Service of the U.S. Department of State. Trial Attorney Sarah Chang of the Criminal Division's Human Rights and Special Prosecutions Section and Assistant U.S. Attorney Rebeca H. Bellows of the Eastern District of Virginia are prosecuting the case on behalf of the United States.

An indictment is merely a charge and defendants are presumed innocent until and unless proven guilty.<sup>24</sup>

<sup>23</sup> U.S. Dep't of Justice Press Release No. 11-1442, International Arms Dealer Viktor Bout Convicted in New York of Terrorism Crimes (Nov. 2, 2011), at <http://www.justice.gov/opa/pr/2011/November/11-ag-1442.html>.

<sup>24</sup> U.S. Dep't of Justice Press Release No. 11-1332, State Department Employee Indicted on Domestic Battery Charges for Assault with a Dangerous Weapon (Oct. 6, 2011), at <http://www.justice.gov/opa/pr/2011/October/11-crm-1332.html>.